Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-067

Hudson's Bay Company

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, March 21, 2014

Canada

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IN THE MATTER OF an appeal heard on November 25, 2013, pursuant to subsection 67(1) of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF six decisions of the President of the Canada Border Services Agency, dated November 15, 2012, with respect to a request for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

HUDSON'S BAY COMPANY **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 25, 2013
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Jidé Afolabi Kalyn Eadie (student-at-law)
Acting Manager, Registrar Programs and Services:	Lindsay Vincelli
Registrar Officer:	Ekaterina Pavlova

PARTICIPANTS:

Appellant	**Counsel/Representative**
Hudson's Bay Company	Michael Kaylor
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Paul Battin

WITNESSES:

Michael T. Gilson
Chief Adventurer/Vice-President
Private Brand
Hudson's Bay Company

Judy Daly
Group Vice-President
Macy's Merchandising Group

Patrice Gonnon
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Hudson's Bay Company (HBC) on February 12, 2013, pursuant to subsection 67(1) of the *Customs Act*[1] from a further re-determination by the President of the Canada Border Services Agency (CBSA), dated November 15, 2012, made pursuant to subsection 60(4).

2. The appeal concerns the calculation of the value for duty of goods imported by HBC from Macy's Merchandising Group (Macy's) and, more specifically, whether the CBSA correctly determined that the "margin support" and "advertising support" discounts (the discounts) granted to HBC by Macy's were properly excluded from the price paid or payable because they were "effected" after importation.

PROCEDURAL HISTORY

3. On December 30, 2010, HBC filed blanket refund and correction requests under paragraph 74(1)(*e*) and subsection 32.2(2) of the *Act*, respectively, in order to amend the value for duty of the goods purchased from Macy's for calendar year 2007. These requests were made on the basis that there was an error in the calculation of the value for duty when the goods were accounted for by HBC's broker because it did not include the discounts.[2] On January 28, 2011, the CBSA informed HBC that it would undertake an on-site verification of its books and records.[3] This verification was conducted from February 7 to February 9, 2011.[4]

4. On July 26, 2011, the CBSA issued its interim verification report, advising HBC that the discounts would not be taken into account for calendar year 2007 as the CBSA considered them to have been effected after importation.[5] On November 17, 2011, the CBSA issued its final verification report confirming its position that the discounts would not be taken into account and also issued Detailed Adjustment Statements pursuant to section 59 of the *Act* in accordance with the findings of this report.[6]

5. On May 23, 2012, HBC filed refund and correction requests for its importations from Macy's in calendar years 2008 and 2009.[7] On July 18, 2012, the CBSA denied the refund and correction requests for the 2008 and 2009 importations on the basis that the discounts had been effected after importation.[8]

6. On April 10 and August 23, 2012, HBC requested that the CBSA re-determine the value for duty under subsection 60(4) of the *Act* for the 2007 and 2008-2009 importations, respectively.[9]

7. On September 28, 2012, the CBSA issued a preliminary decision to deny the re-determination requests for the 2008 and 2009 importations.[10]

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2012-067-06B, Vol. 1B at 29.
3. *Ibid.* at 30.
4. Exhibit AP-2012-067-04B, Vol. 1 at 4.
5. Exhibit AP-2012-04C, Vol. 1 at 28-31.
6. *Ibid*. at 39-46.
7. Exhibit AP-2012-067-04B, Vol. 1 at 4.
8. *Ibid*.
9. Exhibit AP-2012-067-06B, Vol. 1B at 34-36, 37.
10. Exhibit AP-2012-04C, Vol. 1 at 47.

8. On November 15, 2012, the CBSA re-affirmed its earlier decisions not to take the discounts into account for all of the importations from 2007 to 2009.[11] The CBSA issued six decisions pursuant to subsection 60(4) of the *Act* on Detailed Adjustment Statements: two for each year, where one concerned the refund requests for dutiable goods and the other the correction requests for non-dutiable goods.[12]

9. On February 12, 2013, HBC filed this appeal pursuant to subsection 67(1) of the *Act*.[13]

DESCRIPTION OF THE TRANSACTIONS AT ISSUE

10. HBC purchases merchandise from Macy's Merchandising Group in the United States and imports it into Canada for sale to Canadian consumers. During the time period in which the transactions at issue took place, HBC would send purchase orders to Macy's, which were based on Macy's list price for the merchandise. At the same time as it sent the purchase orders, HBC would also issue a letter of credit guaranteeing payment for the goods. The goods were then shipped directly to HBC from various foreign manufacturers. Once the goods were received by HBC, Macy's sent invoices to HBC, again for the full list price of the goods, and HBC would release the required funds to Macy's.[14]

11. In 2006, Macy's and HBC purportedly entered into an agreement, the 2007 Partnership Agreement Procedure,[15] which requires Macy's to pay discounts of 3% for "margin support" and 1.5% for "advertising support", calculated on the basis of billed shipments on a quarterly or semi-annual basis, respectively.[16]

12. Starting in 2007, Macy's accordingly sent shipment reports and cheques for the value of the discounts to HBC at the end of each quarter or semi-annual period, as applicable.[17] Despite the existence of the discounts, the purchase orders and invoices for the transactions at issue continued to reflect the full list price for all of the items purchased.[18]

LEGAL FRAMEWORK

13. In order to impose customs duties on imported goods under the *Act*, a value must first be attributed to the goods. Section 46 of the *Act* specifies that the value for duty must be determined in accordance with sections 47 to 55.

14. Subsection 47(1) of the *Act* provides as follows:

> **47.** (1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.

15. Section 48 of the *Act* provides as follows:

> **48.** (1) Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined . . . .
>
> . . .

11. Exhibit AP-2012-067-06B, Vol. 1B at 38-61.
12. *Ibid*. at 62.
13. Exhibit AP-2012-067-01, Vol. 1 at 1.
14. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 26-30.
15. Exhibit AP-2012-067-04C, Vol. 1 at 49.
16. Exhibit AP-2012-067-04B, Vol. 1 at 6.
17. *Ibid*.
18. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 14.

> (4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).
>
> (5) The price paid or payable in the sale of goods for export to Canada shall be adjusted
>
> . . .
>
> (*c*) by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported.
>
> . . .

16. Subsection 45(1) of the *Act* defines "price paid or payable" as follows:

> "price paid or payable", in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor.

17. In summary, section 47 of the *Act* provides that the primary basis for determining the value for duty is the "transaction value" of the imported goods. Subsection 48(1) confirms that this is the starting point for valuation under the *Act*; it is clear that the value for duty must be appraised on the basis of this method of valuation, subject to the conditions set out in section 48, which are:

- there must be a *sale for export*;
- there must be a *purchaser in Canada*; and
- the *price paid or payable* must be ascertainable.

18. The transaction value method of valuation focuses mainly on the value that a vendor and a purchaser attach to goods in an export transaction. It corresponds to the "price paid or payable" for the goods, that is, the selling price in an export transaction, when it can be determined. In certain cases, this price may be adjusted upwards or downwards to account for certain charges, including any rebates effected before, but not after, the importation of the goods.

19. Subsection 74(1) of the *Act* sets out the conditions under which an importer may request a refund of duties paid:

> **74.** (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if
>
> (*a*) they have suffered damage, deterioration or destruction at any time from the time of shipment to Canada to the time of release;
>
> (*b*) the quantity released is less than the quantity in respect of which duties were paid;
>
> (*c*) they are of a quality inferior to that in respect of which duties were paid;
>
> (*c.1*) the goods were exported from a NAFTA country or from Chile but no claim for preferential tariff treatment under NAFTA or no claim for preferential tariff treatment under CCFTA, as the case may be, was made in respect of those goods at the time they were accounted for under subsection 32(1), (3) or (5);

> (*c.11*) the goods were imported from Israel or another CIFTA beneficiary or from a country or territory set out in column 1 of Part 4 of the schedule but no claim for preferential tariff treatment under CIFTA or an agreement set out in column 2, as the case may be, was made in respect of those goods at the time they were accounted for under subsection 32(1), (3) or (5);
>
> (*c.2*) [Repealed, 1997, c. 14, s. 43]
>
> (*d*) the calculation of duties owing was based on a clerical, typographical or similar error;
>
> (*e*) the duties were paid or overpaid as a result of an error in the determination under subsection 58(2) of origin (other than in the circumstances described in paragraph (*c.1*) or (*c.11*)), tariff classification or value for duty in respect of the goods and the determination has not been the subject of a decision under any of sections 59 to 61;
>
> (*f*) the goods, or other goods into which they have been incorporated, are sold or otherwise disposed of to a person, or are used, in compliance with a condition imposed under a tariff item in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*, or under any regulations made under that Act in respect of a tariff item in that List, before any other use is made of the goods in Canada; or
>
> (*g*) the duties were overpaid or paid in error for any reason that may be prescribed.
>
> . . .

20. Subsection 32.2(2) of the *Act* sets out the requirement for importers to correct their accounting for non-dutiable transactions as follows:

> **32.2** (2) Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(*a*) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect,
>
> (*a*) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and
>
> (*b*) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.

ANALYSIS

Preliminary Issue: Qualification of Mr. Gonnon as an Expert Witness

21. The CBSA submitted an expert report prepared by Mr. Gonnon, the CBSA's lead auditor on the verification of HBC's transactions, and requested that the Tribunal qualify him as an expert in accounting practices at the hearing.[19] During the qualification process, the CBSA led Mr. Gonnon through his credentials, followed by questions put to Mr. Gonnon by the Tribunal.[20]

22. Counsel for HBC objected to Mr. Gonnon's testimony as an expert, but only to the extent that Mr. Gonnon would express an opinion on the proper interpretation of the legislative provisions at issue, since this would fall outside of his area of expertise.[21]

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19. Exhibit AP-2012-067-10A (protected), Vol. 2A; *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 65.
20. *Ibid.* at 66-76.
21. *Ibid.* at 71.

23. The test for the admissibility of expert evidence was set out by the Supreme Court of Canada in *R. v. Mohan*.[22] The court enunciated the following four criteria to consider when assessing the admissibility of expert evidence:

- relevance;
- necessity in assisting the trier of fact;
- absence of any other exclusionary rule of evidence; and
- a properly qualified expert.[23]

24. In the courts, expert evidence may be excluded if its probative value is outweighed by the danger that it will be misused or will distort the fact-finding process.[24] Such a danger may arise where the expert's opinion would be unreliable as a result of his or her bias.[25] Instead of being allowed to advocate for one of the parties or to promote his or her own vested interest in the outcome of the case, the expert should be independent from the exigencies of litigation and provide assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise.[26]

25. Although the rules for qualification of an expert witness are more flexible before an administrative or quasi-judicial body than before the courts,[27] the Tribunal has previously found that it is inappropriate to qualify a witness as an expert where the witness's lack of objectivity or bias impacts on the Tribunal's confidence in the reliability of the expert's testimony.[28]

26. In the present case, though the Tribunal had no issue with the qualifications of the witness and found that he could potentially be said to be an expert in accounting practices,[29] the Tribunal had serious reservations as to the independence of the witness, due to his direct involvement in the valuation audit from which the current appeal partially arises.[30] The Tribunal found that it would be improper to place Mr. Gonnon in a situation where he may have to express an expert opinion on the accounting practices used in an audit that he himself conducted.[31]

27. In addition, the Tribunal found that it did not necessarily require expert evidence in order to decide the current appeal as it does not hinge on such an issue, but rather on legal interpretations and on the legal significance of facts other than those in the field of expertise of Mr. Gonnon.

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22. [1994] 2 SCR 9 (CanLII) [*Mohan*].
23. *Mohan* at para. 17.
24. *Mohan* at paras. 18, 19.
25. United City Properties Ltd. v. Tong, 2010 BCSC 111 (CanLII).
26. Fellowes, McNeil v. Kansa General International Insurance Co., 1998 CanLII 14856 (ON SC), referring to The "Ikarian Reefer", [1993] 2 Lloyd's Rep. 68.
27. R.W. Macaulay and J.L.H. Sprague, Practice and Procedure Before Administrative Tribunals (Scarborough: Carswell, 1988), Vol. 2 at 17-3.
28. *Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (23 December 2010), PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058 (CITT).
29. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 78.
30. Exhibit AP-2012-067-10A (protected), Vol. 2A at 1; *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 71-76.
31. *Ibid.* at 82-83.

28. In light of the above, the Tribunal refused to qualify Mr. Gonnon as an expert witness.[32] Instead, the Tribunal invited the CBSA to call upon Mr. Gonnon to testify solely about facts.[33] Thus, Mr. Gonnon testified as a lay witness, albeit one whose experience in the field of accounting was recognized.[34]

Should the Price Paid or Payable Be Adjusted to Reflect the Discounts?

29. The main issue in this appeal is whether the discounts were "effected" before or after the goods were imported, and therefore whether the price paid or payable should be adjusted to reflect those discounts, or whether they should be disregarded as required by paragraph 48(5)(*c*) of the *Act*.

30. There are two aspects of the issue that must be considered: the proper interpretation of the word "effected" in the context of paragraph 48(5)(*c*), and whether the agreement between Macy's and HBC establishes that the discounts were "effected" prior to importation.

Definition of "effected"

31. The term "effected" is not defined in the *Act* and is not used in this sense anywhere else in the *Act*. The term "effected" must therefore be understood in its ordinary meaning, and consistently with the context in which it is found.

32. The CBSA did not make any submissions on the ordinary meaning of "effected". HBC argued that "effected" should be defined in accordance with the following definition of "effect":

> **1 :** to cause to come into being **2 a :** to bring about often by surmounting obstacles : ACCOMPLISH . . . **b :** to put into operation . . . ***syn*** see PERFORM[35]

33. In addition, the *Canadian Oxford Dictionary* defines "effect" as follows:

> **1** bring about . . . or accomplish . . . . **2** cause to exist or occur.[36]

34. As these definitions make reference to the terms "accomplish" and "perform", it is useful to examine their definitions as well. The *Merriam-Webster's Collegiate Dictionary* defines "accomplish" as follows:

> **1 :** to bring about (a result) by effort . . . **2 :** to bring to completion . . . **3 :** to succeed in reaching (a stage in a progression) . . .[37]

and "perform" as follows:

> **1 :** to adhere to the terms of : FULFILL <~ a contract> **2 :** CARRY OUT, DO **3 a :** to do in a formal manner or according to prescribed ritual[38]

35. The Tribunal finds that all of these terms relate to a common concept of creation; a nascent moment when an obligation is "cause[d] to come into being", is "put into operation" or is otherwise "cause[d] to exist or occur".

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32. *Ibid.* at 82.
33. *Ibid.* at 83.
34. *Ibid.* at 84.
35. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "effect".
36. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "effect".
37. *Merriam-Webster New Collegiate Dictionary*, 11th ed., *s.v.* "accomplish".
38. *Ibid.*, *s.v.* "perform".

36. In reading paragraph 48(5)(*c*) of the *Act*, the Tribunal therefore interprets the term "effected" as requiring that any rebate or other decrease that "came into being" or "was caused to exist or occur" after the goods were imported be disregarded when calculating the price paid or payable. In other words, the "trigger" or the reason for the existence of the rebate must exist before importation, and not be dependent on a condition that can only be met after such importation has occurred, in order for the rebate to be deducted from the price paid or payable.

Was There a Legally Binding Agreement Between HBC and Macy's?

37. Before proceeding with the analysis, the Tribunal must address the nature of the evidence put before it to prove the existence of the agreement between Macy's and HBC.

38. HBC produced a single-page document, the 2007 Partnership Agreement Procedure, which very briefly describes the terms of and schedule for the rebates at issue as set out above.[39]

39. On November 22, 2013, a few days before the hearing, the Tribunal queried counsel for HBC as to the existence of a broader, more comprehensive agreement between parties from which this document could have originated.[40] The Tribunal was told that this was a stand-alone document, not included in any other broader series of agreements.[41]

40. At the hearing, the CBSA challenged the ability of the document submitted by HBC to prove the existence of an agreement between HBC and Macy's, as this document is undated (except for the reference to the year in the title) and unsigned.[42] In response to this argument, HBC referred to two letters submitted to the CBSA by Mr. Harry Frenkel of Macy's,[43] and asked Ms. Judy Daly of Macy's to testify that Mr. Frenkel was present at the drafting of the agreement and had overseen its operation.[44] However, it is important to note that neither Ms. Daly nor HBC's other witness, Mr. Michael Gilson, were themselves present when this document was drafted and thus could not confirm its authenticity from their personal knowledge.[45]

41. The Tribunal finds that it cannot rely on the 2007 Partnership Agreement Procedure document as establishing a legally binding agreement between HBC and Macy's.

42. The lack of signature and date make it impossible for the Tribunal to find that it offers either proof of execution or proof of authorship and origin, as required by the rules of evidence relating to the proof of private documents.[46] Though, as an administrative tribunal, the Tribunal is not strictly bound by these rules, the Tribunal nevertheless finds that the 2007 Partnership Agreement Procedure document is too deficient in both of these respects to be used to establish the existence of a binding agreement.

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39. Exhibit AP-2012-067-04C, Vol. 1 at 49.
40. Exhibit AP-2012-067-25, Vol. 1E.
41. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 5.
42. *Ibid.* at 40. The document does bear the Macy's logo in the upper left corner and the HBC logo in the upper right corner but, otherwise, does not specify any form of assent from its adherents.
43. Exhibit AP-2012-067-04C, Vol. 1 at 50, 51.
44. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 57.
45. *Ibid.* at 54-55.
46. Bryant, Alan W., Lederman, Sidney N., and Fuerst, Michelle K., *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, 3rd ed. (Markham, Ontario: LexisNexis Canada Inc., 2009) at 1234-1238.

43. In addition, the Tribunal finds that it cannot rely on Mr. Frenkel's letter or Ms. Daly's testimony as proof of the execution of the agreement. Mr. Frenkel was not present at the hearing and opposing counsel had no opportunity to cross-examine him on this issue. While, as noted above, the rules of evidence before an administrative tribunal may be relaxed, the Tribunal must still be cautious in relying on what amounts to hearsay evidence.

44. However, in addition to the 2007 Partnership Agreement Procedure document itself, HBC produced a document showing the actual calculation of the margin support discount for the period from January to March 2007.[47]

45. Specifically, the last two columns of this document set out the total value of purchases made during that period, based on billed shipments, and an amount representing 3% of the total sales. This was accompanied by a copy of a statement and cheque payable by Macy's to HBC in the same amount, which again represents 3% of total sales, dated April 20, 2007.[48] According to the accompanying deposit slip, the cheque was deposited in HBC's account on April 21, 2007.[49]

46. HBC also produced a document showing the calculation of the advertising support rebate for the period from August 2007 to January 2008.[50] Similarly, the last two columns set out the total value of purchases made during that period, based on billed shipments, and an amount representing 1.5% of the total sales. Again, a statement, cheque and deposit slip were produced to demonstrate that the payment was made by Macy's to HBC on or about February 20, 2008, and deposited by HBC on March 3, 2008.[51]

47. Upon considering these two sets of documents, the Tribunal immediately noticed that they do not correspond to the scope of the transactions at issue in this appeal, as the appeal covers all of the transactions that occurred between Macy's and HBC from 2007 until 2009. Furthermore, the Tribunal heard testimony from Mr. Gilson and Ms. Daly to the effect that such statements and cheques had been sent regularly from Macy's to HBC since at least January 2007 and even possibly beginning in December 2006.[52]

48. Therefore, at the hearing, the Tribunal asked the parties to agree upon and provide the Tribunal with a list of all of the transactions at issue in the appeal, with similar documents showing the calculation of the discounts and proving the issuance and deposit of the cheques, if available.[53]

49. To this end, on December 4, 2013, counsel for HBC filed a series of corresponding documents with the Tribunal, representing 18 reimbursement events that took place through the course of 2007 to 2009.[54] These documents show bi-annual reimbursements from Macy's to HBC representing 1.5% of sales volumes and quarterly reimbursements from Macy's to HBC representing 3% of sales volumes for 2007, 2008 and 2009.[55]

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47. Exhibit AP-2012-067-04C, Vol. 1 at 52.
48. *Ibid.* at 53-55.
49. *Ibid.* at 56.
50. *Ibid.* at 57.
51. *Ibid.* at 58-61.
52. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 11, 17-18; see also 96-97.
53. *Ibid.* at 190-91.
54. Exhibit AP-2012-067-27, Vol. 1E.
55. The Tribunal notes that counsel could have produced these documents beforehand as parties clearly knew about them and testified to their existence. Here, HBC's appeal is saved only by the flexibility of rules of evidence before an administrative tribunal and the Tribunal's finding that it was necessary to fully understand the facts in order to properly adjudicate the appeal.

50. Although the Tribunal could not lend sufficient credence to the 2007 Partnership Agreement Procedure document as presented, for the reasons discussed above, the behaviour of the parties over the period covering 2007-2009, and the systematic compilation of said rebates, the reimbursements by cheque, along with the deposit of given amounts into HBC's accounts, demonstrates a sustained practice between the parties that clearly supports the assertion that an agreement existed between them.

51. The Tribunal therefore finds that the documents detailed above, complemented by the testimony of HBC's witnesses as to the operation of the agreement in practice, provide sufficient evidence for it to determine that there was in fact an agreement in place between the parties to provide rebates of 3% and 1.5% at regular intervals from 2007 through 2009.

Were the discounts "effected" prior to the importation of the goods?

52. HBC's main argument is that the price paid or payable should be adjusted to reflect the discounts because, in its opinion, the agreement between it and Macy's is what "effected" the discounts, and this agreement was in place prior to the importations.

53. The CBSA's primary position is that the discounts should not be considered part of the agreed price paid or payable between HBC and Macy's, as evidenced by the terms of sale found on the commercial invoices, the purchase orders, the payment, the accounting, and the books and records kept by HBC.

54. In particular, the CBSA relied on the fact that the discounts were not entered as a term of sale on the commercial invoices or purchase orders, or recorded as receivable in the books and records at the time of importation.[56] The CBSA relied on Memorandum D13-4-10 to support its position that all terms of sale must be reflected in the importer's accounting documents in order to be considered in the calculation of the price paid or payable.[57]

55. Instead, it is the CBSA's position that the discounts were triggered by Macy's issuance of the shipment reports and cheques, i.e. by the payment of the rebates after the importation of the goods, and therefore *must* be disregarded in accordance with the plain language of paragraph 48(5)(*c*). The CBSA cited the Federal Court of Appeal in *Deputy, Canada (Minister of National Revenue), Customs and Excise v. Toyota Canada, Inc.*[58] as support for this interpretation of paragraph 48(5)(*c*).[59]

56. HBC argued that the CBSA's reliance on the accounting and payment practices of the importer to determine that the discounts were effected after importation is misplaced.[60] HBC submitted that this requirement is not as clearly set out in Memorandum D13-4-10, and, even if it were, this requirement is not reflected in the actual terms of paragraph 48(5)(*c*).[61]

57. Further, HBC relied on the Tribunal's decision in *Quadra Chemicals Ltd. v. Deputy M.N.R.*[62] to support its assertion that, instead of only looking at the commercial invoices, etc., the CBSA was required to consider all of the terms of sale between HBC and Macy's, which would include the agreement.[63]

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56. Exhibit AP-2012-067-06A, Vol. 1A at 11.
57. *Ibid.* at 15-16.
58. 1999 CanLII 8189 (FCA).
59. Exhibit AP-2012-067-06A, Vol. 1A at 11-12.
60. Exhibit AP-2012-067-04B, Vol. 1 at para. 30.
61. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 155-56.
62. (26 July 2004), AP-93-260 (CITT) [*Quadra Chemicals*].
63. Exhibit AP-2012-067-04B, Vol. 1 at 10.

58. In addition, HBC argued that, in accordance with the Federal Court's analysis in *Nordic Laboratories v. Deputy M.N.R.*,[64] there was no obligation or condition that had to be fulfilled subsequent to importation for the discounts to be granted; rather, all of the relevant terms are set out in the agreement and thus the discounts cannot be said to have been effected after importation.[65]

59. In response to these arguments, the CBSA argued that *Quadra Chemicals* does not require it to consider the agreement with Macy's, because *Quadra Chemicals* deals with a situation involving estimated prices.[66] Contrary to HBC's position, the CBSA argued that *Quadra Chemicals* in fact establishes that the terms of sale as shown on the commercial invoices should be considered determinative.[67]

60. In addition, the CBSA argued that HBC cannot rely on the jurisprudence for corrections (i.e. *Nordic Laboratories*) because the reason for HBC's request for a refund is not in fact because it made an error in its accounting for the goods.[68] Instead, the parties made a business decision to delay the payment of the discounts and therefore it was the parties' intention that the discounts should be considered to have been effected after the importation of the goods.[69]

61. In light of the Tribunal's interpretation of the word "effected" in the context of paragraph 48(5)(*c*) as set out above, the Tribunal agrees with the parties that it is clear that the "trigger" or the reason for the existence of the rebate must exist before importation. Furthermore, the rebate must not be dependent on a condition that can only be met after such importation has occurred.

62. The Tribunal believes that the situation presented in this appeal is analogous to that dealt with in *Nordic Laboratories*. In that case, the importer, Nordic Laboratories Inc. (Nordic), had negotiated an agreement that would retroactively change the prices it had to pay to its foreign supplier, Tanabe, for certain patented products if a generic product was introduced into the Canadian market. After Nordic had imported the products into Canada and paid the appropriate duty, it became aware that generic forms had been introduced into the market months before its importation of the patented forms. Accordingly, Tanabe gave Nordic a credit based on a reduced price as agreed. Nordic then applied for a refund of the duty paid based on the reduced transaction value. The Minister of National Revenue and, subsequently, the Tribunal denied the adjustment of the value for duty on the basis that the credit was a decrease in the price paid or payable that was effected after importation and therefore must be disregarded in accordance with paragraph 48(5)(*c*) of the *Act*. On appeal, the Federal Court found as follows:

> **57** The Tribunal concluded that, since one of the conditions required by the 1988 Agreement was fulfilled only after the Product was imported into Canada, the rebate of, or decrease in, the price paid or payable had to be disregarded. In the Tribunal's view, the 1988 Agreement required the fulfilment of two conditions, namely, the introduction of a generic product into Canada and Tanabe's recognition or confirmation of that fact. In my view, the evidence before the Tribunal does not support the Tribunal's conclusion. In effect, article 5.05 of the 1988 Agreement is clear that *the trigger is the sale of a generic product in Canada. Under that article, nothing else is required to render the new price structure applicable.* As I have already stated, Tanabe's recognition or confirmation was obviously required, failing which legal proceedings would probably have had to

64. [1996] F.C.J. No. 1067 [*Nordic Laboratories*].
65. Exhibit AP-2012-067-04B, Vol. 1 at 9-10.
66. Exhibit AP-2012-067-06A, Vol. 1A at 13.
67. *Ibid.* at 11-12.
68. *Ibid.* at 13-14.
69. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 165.

> have been instituted in order to decide the issue. In the circumstances, legal proceedings were not required as the parties were all agreed that a generic product had indeed been introduced into Canada prior to December 14, 1988.
>
> **58** I am therefore of the view that the underlying condition was fulfilled when the generic product was introduced into the Canadian market. Consequently, if the credit note was a rebate of, or a decrease in, the price paid or payable, I am of the view that it was not effected after the Product was imported into Canada.
>
> [Emphasis added]

63. To summarize, the Court found that the only condition required to "trigger" the credit, the introduction of a generic product into the Canadian market, existed before the importation of goods, despite the fact that the agreement additionally stipulated a need for the verification of that condition by Tanabe.

64. Similarly, in this appeal, despite the fact that the payment of the discounts is only made once the shipment reports and cheques have been issued, the Tribunal finds that this is not the event that triggers the discounts. Instead, the Tribunal is of the opinion that, in accordance with the agreement, the only condition that must be fulfilled for HBC to be entitled to the discounts is the *purchase of goods* from Macy's.

65. The Tribunal believes this position to be consonant with the teachings of the Federal Court of Appeal in *Canada v. BASF Coatings & Inks Canada Ltd.*,[70] which read, in relevant part, as follows:

> [10] It is difficult, on the basis of these provisions, to accept the respondent's submission that because the Act does not expressly provide for any reduction in the "sale price" such as that contemplated in section 46 of the Act (or in sections 181.1 and 232 of the Act with regard to the Goods and Service Tax (GST)), a taxpayer's tax liability cannot be affected by a reduction in the "sale price" subsequent to the original sale. The respondent submits that the trial judge was correct in concluding that the wording of paragraph 50(1)(a) dictated that the amount of tax owing had to be quantified at the time when either of the two events set out in that paragraph occurred, namely the earlier of either when the goods are delivered to the purchaser or when the property in the goods passes. Such reading, she says, is in accordance with the plain and ordinary meaning of the paragraph, and is determinative of the issue. The purposive approach to the Act or the economic and commercial reality of a transaction cannot alter the result when the words of the statute are clear.
>
> [11] Such an interpretation, in our view, brings unnecessary inflexibility to a reading of the relevant sections. Even a plain and ordinary reading of the charging paragraph 50(1)(a) of the Act suggests that what Parliament intended was to impose a tax on the "sale price" of goods sold. The phrase "sale price" does not by necessary implication exclude the calculation of a price reduction, if a reduction is later given on a "sale price". The fact that such a phrase is qualified immediately by the words "payable . . . at the time when the goods are delivered . . . or . . . when the property in the goods passes, whichever is the earlier", does not establish a rigid rule with regard to the time at which the calculation of the sale tax is to be made. Paragraph 50(1)(a) relates to a point in time when the "sale tax" is "payable" not when it is "calculated". We think the Tribunal had it right when it said:
>
> > . . . The Tribunal considers that the wording of paragraph 50(1)(a) of the Act does not, as the respondent contends, mean that the amount of tax owing must be quantified at the time that either of the events set out in the subsections occurs, i.e. when the goods are delivered to the purchaser or when the property in the goods passes. Rather, the Tribunal believes that, while this wording crystallizes the obligation to pay the tax, it is not determinative of the amount of tax to be paid. The quantification of tax owing is dependent upon the phrase "sale price" in subsection 50(1), and this phrase is given meaning under section 42, not paragraph 50(1)(a) of the Act. In the Tribunal's view, determination of

70. 1998 CanLII 8215 (FCA) [*BASF*].

> the amount of tax payable relates to the actual amount received by the vendor, and, in the instant case, such amount can only be determined after the occurrence of those events which are fundamental to establishing what the appellant actually receives, even if such events occur subsequent to the events referenced in paragraph 50(1)(a) of the Act.
>
> [12] But even if we were to accept that the word "payable" relates not only to the time when a vendor is liable for tax, but also to the moment of calculation, it should be noted that at the time when the property passed between the appellant and its jobbers, they were bound by a valid contract by which a rebate or subsidy on the sale price would be owed. The only element left was the actual calculation. The reduction in price was therefore implicit at the time the property passed.
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> [Footnote omitted]

66. The Tribunal feels that a close parallel to this decision can be drawn in the present appeal. In this instance, the agreement between the parties sets out the entitlement to the discounts. The calculation of the amount owing constitutes a necessary exercise, rather than a condition precedent to entitlement to the discounts, which the parties have chosen to undertake after importation.

67. The Tribunal is of the view that imposing a strict and formalistic temporal requirement on the interpretation of the provisions relevant to this appeal would not be harmonious with the overall scheme of the *Act*. Rather, attention must be paid to what actually triggered the discounts, in this case, *purchases* made against the backdrop of a subsisting agreement concerning them.

68. The Tribunal acknowledges that the statutory provisions at issue in *BASF* are not the same as those at issue in the present appeal. However, if anything, the charging provisions at play in *BASF* were stricter than the ones involved here and so the fact that the Court of Appeal found that they should be interpreted flexibly is especially instructive.

69. As noted above, the CBSA argued that Memorandum D13-4-10 requires that the discounts must be reflected on the commercial invoices, purchase orders, or other documents used to account for the goods at the time of importation in order to be considered in the calculation of the price paid or payable. Specifically, at the hearing, the CBSA pointed to the note below paragraph 7[71] of the Memorandum, which states:

> **Note:** For coding purposes, the value for duty code on the accounting documents should reflect discounts (such as cash discounts) as part of the price paid or payable rather than as adjustments. For example, when the obligation or condition necessary for a discount is fulfilled or met prior to the importation, the value for duty code should be code 13 or 23 if the purchaser and the vendor are related parties. When adjustments per subsection 48(5) occur, the value for duty code should be code 14 or 24 if the purchaser and the vendor are related parties.[72]

70. The Tribunal agrees with HBC that there is no clear direction to importers here regarding any requirement to include the terms of any discount on commercial invoices or purchase orders. Instead, this is, at most, a direction on which value-for-duty code to use when filling out the CBSA's B3 Form, and does not speak to any requirement with respect to the contents of the documents that will be submitted in support of the value-for-duty declaration.

71. Further, and more germanely, the Tribunal notes that Memorandum D13-4-10 does not cite any specific legislative reference to support this requirement, which would therefore appear to be CBSA's administrative policy only. The Tribunal is of the opinion that the requirement does not sufficiently or accurately reflect the legislative ambit of paragraph 48(5)(*c*) itself.

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71. *Transcript of Public Hearing*, Vol. 1, 25 November 2013, at 169-70.
72. Exhibit AP-2012-067-04D, Vol. 1A at 86.

72. The CBSA also relied on *Quadra Chemicals* as part of its basis for considering that the terms of the sale are only those set out in the purchase orders and commercial invoices. However, the Tribunal reads the decision in *Quadra Chemicals* as turning on the fact that the adjustments to the price that the appellant was attempting to have deducted from the price paid or payable were negotiated after the importation of the goods, and thus could not be said to have been "effected" prior to their importation. The Tribunal in that case used the fact that the adjustments were not reflected on the purchase orders to support its finding regarding the timing of the negotiated reduction in the price. This reading is supported by the reasons of the Federal Court in *Nordic Laboratories*.[73]

73. Finally, the Tribunal must address the CBSA's argument that the Tribunal should not allow itself to be guided by decisions such as *Nordic Laboratories* in that these were cases which dealt with corrections and the current appeal does not. The Tribunal does not agree.

74. Paragraph 48(5)(*c*) of the *Act* cannot be read in a strict and rigid manner which would prohibit any corrections or modifications after the effective date of importation. If the conditions for such a correction or modification existed before the importation of the goods, then a request for a refund of duties paid can be made in accordance with the appropriate paragraph of subsection 74(1) of the *Act*, or a correction can be filed in accordance with section 32.2 of the *Act* if no duty was owing as a result of the original accounting.

75. In this case, the Tribunal finds that HBC appropriately filed for a re-determination and refund under paragraph 74(1)(*e*) of the *Act* on the basis that it had made an *error* when accounting for the goods.

76. It is clear from the testimony of HBC's witness, Mr. Gilson, that, prior to 2010, HBC had some difficulties with its customs department and certain aspects of the relationship between the parties, in regard to statutory compliance, were omitted.[74] Simply put, it appears that, prior to 2010, HBC was not aware that it was entitled to deduct the amount of the discounts from the price paid or payable.

77. The Tribunal finds additional support for its finding that the *Act* must allow for parties to file corrections or modifications after importation in *Jockey Canada Company v. President of the Canada Border Services Agency*:[75]

> 187. As a matter of law, the *Act* contemplates that a price paid or payable for imported goods which is determinable at the time of entry may change after the goods are imported without having the effect of rendering section 48 inapplicable. In other words, the mere fact that the price paid or payable for the goods may change after their importation does not necessarily mean that the price paid or payable is not ascertainable at the time of importation. This is made clear by paragraph 48(5)(*c*), which provides that the price paid or payable shall be adjusted "by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported."
>
> 188. By virtue of this provision, the price paid or payable for goods when they are sold for export under subsection 48(4) of the *Act* is not necessarily the actual final price that is ultimately paid by an importer. In other words, if the price paid or payable for the goods when they are sold for export is modified after the goods are imported, a relevant question is whether the price paid or payable (i.e. the transaction value of the goods) should be adjusted to reflect such price changes that occur post-importation.

73. *Nordic Laboratories* at para. 53.
74. *Transcript of Public Hearing,* Vol. 1, 25 November 2013, at 51.
75. (20 December 2012), AP-2011-008 (CITT) [*Jockey*].

> 189. On this issue, the Tribunal notes that the evidence indicates that the CBSA did not treat the year-end downward adjustments to the transfer price made by JCC in order to achieve its transfer pricing objectives for income tax purposes as rebates or decreases within the meaning of paragraph 48(5)(*c*) of the *Act*.
>
> 190. As a matter of fact, it took those adjustments into consideration in determining the transaction value of the goods in issue pursuant to section 48 of the *Act*. This resulted in deductions to the price paid or payable and, by implication, to the value for duty of the Asian goods, in certain cases. At the hearing, Mr. Fitzgerald explained that this decision was consistent with the CBSA's standard practice to allow this type of year-end adjustments, since they affect the value which a vendor and a purchaser attach to the imported goods.
>
> 191. Typically, the CBSA allows importers to self-correct their value for duty declarations at the end of the fiscal year if, as a result of transfer pricing adjustments, they end up paying less for the imported goods that they purchased from a related party compared to the transfer price that they declared at the time of importation. Mr. Fitzgerald also stated that the CBSA expects importers to file self-corrections under section 32.2 of the *Act* if, as a result of transfer pricing adjustments, they end up paying more for the goods that they purchased from a related party than the amount that they declared at the time of importation.
>
> 192. The Tribunal finds that this practice is consistent with the requirements of section 48 of the *Act*. Indeed, downward price adjustments to the price paid or payable for imported goods that occur post-importation do not necessarily constitute rebates in the price paid or payable for the imported goods within the meaning of paragraph 48(5)(*c*) of the *Act*.
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> [Footnotes omitted]

78. While the Tribunal acknowledges that the decision in *Jockey* deals with transfer pricing situations, and is not directly analogous to the facts of this appeal, the Tribunal nevertheless notes that *Jockey* demonstrates that the CBSA has recognized that in certain circumstances it is appropriate to allow corrections to the price paid or payable after importation where there is an agreement in place between parties.

DECISION

79. For all of these reasons, the Tribunal finds that the discounts should be deducted from the price paid or payable, as they were "effected" prior to the importation of the goods and therefore should not be disregarded in accordance with paragraph 48(5)(*c*) of the *Act*.

80. The appeal is therefore allowed.

Jason W. Downey
Jason W. Downey
Presiding Member